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LEX NON EXACTE DEFINIT SED ARBITRIO BONI VIRI PERMITTIT.

The law does not define exactly but trusts in the judgment of a good man, is a maxim upon which Bacon and Coke were agreed. Some modern writers have intimated that this maxim is obsolete. It is safe to conclude that such authors have not a very deep knowledge of the history of this maxim, or a broad conception of equity or the rules of construction. There is no good reason why this rule should not be as practical today as in Bacon's time, and it is quite certain that the writers making such statements are not as fully fitted by nature or depth of learning to comprehend the breadth of meaning and the utility of that maxim, as was either Coke or Bacon. There is no clearer demonstration of the utility of such a maxim than that presented by Themotocles in his Antigone. Polynices having rebelled against his fatherland was slain by his brother and an edict proclaimed that he should be left unburied where he lay. His sister, Antigone, contrary to this edict, caused the body to be buried. Creon, the king, confronts her with her disobedience to the law. Antigone replies that such a law was not from Zeus, nor Justice that abides among the gods. Such laws were from Hades. She declares that she did not deem Creon's laws of such force "that they, a mortal's bidding, should override unwritten laws eternal in the heavens; not of today or yesterday are these, but live from everlasting and from whence they sprang none knoweth." Why should she fear to die for the disobedience of Creon's law, when Justice, a decree eternal in the heavens, bade her bury her brother; she had to die sometime. To undergo the edict of Creon was no grief at all but, "had I left my brother, my mother's child, unburied where he lay, then I had grieved; but this grieves me not; senseless seem I to thee so doing! Be like a senseless judgment finds me void of sense." This philosophy of the law found lodgment in the minds of the greatest lawyers of all the ages, and finds expression today. Indianapolis v. Horst, 93 U. S. 291; Oakley v. Aspinwall, 3 N. Y. 547, 1 Bl. Com. 42; O'Connell v. Reed, 56 Fed. Rep. 531; Shepard v. Adams, 168 U. S. 618; So. Pac. R. Co. v. Denton, 146 U. S. 202, 36 L. Ed. 943; R. R. v. Pinckney, 149 U. S. 144. A very recent decision of the Missouri Supreme Court (State v. Sheppard, 192 Mo. 515, 64 Cent. L. J. 186), most fully gives expression to the philosophy of the law, which does not even regard constitutional provisions, so rigid in their letter, to stand as a bar to simple justice. That this philosophy of the law was recognized by Cicero, Ulpian, Tribonian, Bacon, Coke, Blackstone, Mansfield, Marshall, Story, Kent, Field, Webster, and the decisions in England and many of our state courts will not be denied by any one. It means that they believed that certain moral principles are of such consequence and dignity that neither constitutions nor statutes may stand against them. That is to say, that in the construction of the laws such interpretations will not be put upon constitutional provisions and statutes as to outweigh the plain dictates of good morals. There is another part of the constitution which is found in the acceptation of the fixed maxims, old as legal literature, and expressed by every great philosopher and in the Scriptures, which will outweigh an unjust or unreasonable statute. These fundamental protections of government are of such vast importance, that we are taking particular pains to reiterate them till they shall become as the light to our readers which they were to the greatest legal intellects of all the ages and which deserve to be revered today, as much as at any time in the world's history. In fact, the many decisions of our courts which support statutes which are a menace to good morals, call aloud for a return to the wisdom which guided the great minds we have mentioned. Articles have been written in our legal magazines and other periodicals, condemning the idea that there are great *datum posts*, the dominant initials, from which our constitutions and statutes must be reckoned. If we do not build with these initials constantly in view, we must go wrong and our structures become a menace instead of a bulwark of safety. It is all bosh to say that the will of the people is our sovereignty when

that will is expressed in laws which are plainly against reason and good morals. We certainly cannot go wrong in regarding the maxims as a part of the constitution which stands guard against such a menace to good government. It is because the maxims and their relationships are not understood, and because they are not taught in our law schools, that the idea has taken root, that there is not an unwritten constitution. The advocates of such a position are bound to admit that their position is against the opinions of those who have done the greatest service to mankind in advancement of the philosophy of the law in all ages.

To exclude the existence of the unwritten constitution leaves an unjust statute to play havoc when construed literally, whereas, the unwritten constitution given credit, permits no injustice to stand as law. "Belike a senseless judgment finds me void of sense." The fixed initials of the unwritten constitution being the maxims, all danger of uncertainty in the administration of justice is completely avoided and this was fully comprehended by the great masters we have so often of late mentioned in our pages. While it is true that the voice of the people is our sovereignty, yet, the voice of the people is not the voice of injustice, for according to the maxims the voice of the people is the voice of God, and the voice of God cannot be the voice of injustice. Hence the maxim, *Lex non exacte definit sed arbitrio boni viri permittit.* A good man may be trusted not to allow "judgment to be turned away backward," nor, "justice to stand afar off," neither will he allow "truth to be thrown down in the street," nor, will he bar the entrance of "equity." Isaiah, 59th ch. Quoting from a recent article of Mr. Hughes in this Journal, Vol. 64, p. 170: "In this connection it seems permissible to suggest that, *Salus populi suprema lex*, is associated with the foregoing observations. This epitaph is suggested from one of the world's most heroic figures, Leonidas. for whom it was inscribed: 'Go tell the Spartans thou that passest by, that in obedience to their laws here we lie.' Those who perceive that Marathon and its Tumulus stand for England and the western hemisphere more than do Hastings or Saratoga, come to know that 'antiquity did nothing in vain.' They come to know that maxims are the condensed good sense of nations, that they are the acorns, the roots and heartwood of every merciful, protecting and useful government; that the right of government to exist depends upon its recognizing fundamental rights, whether or not they are reaffirmed in constitutions or statutes. These primary rights are the unwritten constitution which is above government and its agencies."

NOTES OF IMPORTANT DECISIONS.

FORGED CHECK—A BANK PAYING A CHECK HAS A RIGHT TO RELY ON THE ENDORSEMENTS IN REGULAR COURSE.—The case of Greenwald v. Ford, 109 N. W. Rep. 516, recently decided by the Supreme Court of South Dakota is interesting, in that the court struck a chord which if followed up may bring all the courts into tune. In this action by the bank for money paid on a forged check, defendant testified that he received the check as security for a loan from a comparative stranger, whom he supposed was a gambler, and that he did not know or make any inquiry as to the alleged signer of the check, the body of which was written by the same person who wrote the name of the payee on the back thereof. The check was deposited with a bank for collection. The check bore the indorsement of the alleged payee and defendant, and the bank guaranteed the previous indorsements. The bank receiving the check for collection as agent of defendant was advised of the forgery several days before forwarding to the alleged payee a certificate of deposit for the amount thereof. It was not shown that the certificate of deposit received from the collecting bank had ever been paid. Defendant had received the money loaned to the alleged payee before the certificate was forwarded to him. The principle upon which the court proceeded is the very best reason that could be given for the conclusion reached.

There is no code of the efficiency equal to that interpreted by the maxims, and it would have done David Dudley Field a world of good to have seen it related, that a provision of a code was based upon a maxim and that its interpretation depended upon that maxim. It was the grief of his life that the New York code did not get an interpretation with the maxims as the basis. We predict that the day is coming that will see the idea which he had of the interpretation of the code, well established throughout the United States. The court said in part:

"Bearing in mind the authoritative rule of action applied in the cases that have been thus noticed with approval, it becomes necessary to give the evidence most studious examination, as a complete understanding of the facts and circumstances is vitally essential to a proper determination of the appeal. Now appellant, who was

engaged in the saloon business, testified in substance that as security for the loan of $50 he received the check from a comparative stranger, and, while he did not know his name or inquire concerning his business, he supposed him to be a gambler, as he was around with that class of people. Nor did he know or make any inquiry as to E. Hoselton, the purported maker of the check, the body of which was apparently written by the same person who wrote the name 'L. C. Gibson' on the back thereof. If it be permissible, the inference that this person ever claimed to be L. C. Gibson, or was so known and recognized anywhere, arises from the fact that such name was written on the back of the check when appellant received and indorsed the same before depositing it for collection through his agent, the State Banking & Trust Company of Sioux Falls. Nor did the cashier of such bank know L. C. Gibson or his signature, and while he acted as a mere collection agent for the appellant, he indorsed the check 'Pay any bank or banker, or order (all previous endorsements guaranteed). State Banking & Trust Co., Sioux Falls, S. D., F. H. Holister, Cashier.' The check, thus deposited for collection sometime after the 10th day of August, 1904, reached the Farmers' State Bank of Preston in due course of mail, and shortly after the remittance therefor, made on the 15th day of that month, was received by the State Banking & Trust Company, it received the notice that the Hoselton check was a forgery. The check was dated August 10th, and appellant testified that he received it within a few days of that time and within a day or two afterward left the same at the bank for collection, that between that time and when he received a certificate of deposit for the amount from the State Banking & Trust Company he was away from Sioux Falls about a week, and that after receiving such certificate he kept it in his safe for some days before sending it on to Gibson, who had in the meantime fully paid the $50 loan. It will thus be seen that the State Banking & Trust Company, as the agent of appellant, was fully advised of the forgery several days before the certificate of deposit was forwarded to Gibson, and for the purposes of this case it may be presumed that the agent bank promptly notified appellant, for whom it was acting in the premises. It was not shown at the trial that this certificate of deposit, received by appellant from the State Banking & Trust Company, has ever been paid, and the evidence, viewed in the light of all the circumstances, sustains the inference that after appellant had received the $50, and before the certificate was forwarded to Gibson, he had actual notice that the check was a forgery. Section 1687, Rev. Civ. Code, is as follows: 'As against a principal, both principal and agent are deemed to have notice of what ever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.'

Moreover, the indorsement of the State Banking & Trust Company on the back of such check was of a character most likely to mislead, and the cashier of the Farmers' State Bank of Preston, who was not then very familiar with the signature of E. Hoselton, was very properly allowed to testify that he measurably relied upon such indorsement and that of G. A. Ford, supposing that the check was going through the regular channel and had reached him in the ordinary course of the banking business. The maxim that, 'Where one of two innocent persons must suffer by the act of the third, he by whose negligence it happened must be the sufferer,' was adopted as section 2442 of our Revised Civil Code, and no well-reasoned authority can ever militate against a precept so firmly grounded upon the principles of natural justice. Treating this as a case where money was paid by one party to another through a mutual mistake of fact in respect to which both were equally bound to inquire, the loss must be sustained by appellant as the party to the fault or negligence of whom it is plainly traceable."

VENDOR AND PURCHASER—WHEN THERE MAY BE A WAIVER BECAUSE OF DEFAULT OF PAYMENT AT TIME SPECIFIED.—The case of Barnett v. Sussman, 102 N. Y. Supp. 287, is a terse statement of the law. It seems that the contract between the plaintiffs and the defendant was that the plaintiffs should pay the defendant $320 for four lots of land by paying $32 down and $20 a month thereafter. It was made June 22, 1901. It contained a clause that on default in any payment the seller might 30 days thereafter elect without notice that all the payments become forfeited to her and belong to her as liquidated damages, and that thereupon the contract should terminate.

In reversing the case the supreme court said: "The plaintiffs paid $209 in all. The last payment was of $10 in September, 1903. The payments were not according to contract, but irregular as to time and amounts from the beginning, the purchasers being all the time in arrears owing to illness and lack of work. The seller always accepted the payments, however, and thereby so far waived the forfeiture contract that she could not revive it, if at all, except by notice to the purchasers that if they did not pay the balance due within a reasonable time specified such forfeiture would be then exercised. Harris v. Troup, 8 Paige, 423; Cythe v. La Fontain, 51 Barb. 186; Murray v. Harbor Assn., 91 App. Div. 397, 86 N. Y. Supp. 799; Cook v. Wardens, etc., 67 N. Y. 594; Day v. Hunt, 112 N. Y. 191, 19 N. E. Rep. 414; Toplitz v. Bauer, 161 N. Y. 333, 55 N. E. Rep. 1059.

The notice which the seller claims to have given—for it is not found by the trial court and is disputed that she gave any, the court's decision being based on the purchasers' defaults alone—was not of a forfeiture at all. To make the forfeiture she had to put herself in a position of strict right. The trial court should therefore

have given the plaintiffs relief. The defendant claimed that she had sold the property to another for $950 after the plaintiffs' last payment, and therefore could not specifically perform. Even so, the judgment should have been for some appropriate equitable relief in lieu, as that the defendant convey to the plaintiffs on payment of the balance due on the contract or else refund to them the amount they had paid; or that she account to them for the second sale, at all events if they were made in bad faith toward the plaintiffs, and the plaintiffs' defaults are excusable."

THE RESULTS FLOWING FROM THE EXTINCTION OF THE CIVIL ACTION FOR CONSPIRACY.

Notwithstanding the confusion that formerly existed it is now generally recognized that there can be no civil action for conspiracy. The old distinction that to the commission of the crime of conspiracy no overt act was necessary, the agreement constituting the gist of the offense, but to permit of a civil action some actual damage must be shown, has been done away with. It is now generally understood that the proper remedy lies in an action on the case and that the presence of a conspiracy is merely an accident.[1] Some unlawful act must be perpetuated aside from the formation of a combination.

The fact of the conspiracy in such cases is not however regarded by the courts as irrelevant. It may be alleged and proved as aggravating the offense, and affecting the redress.[2]

From these facts a certain conclusion would seem to follow, which however has not generally been recognized, namely, that a number of persons should be allowed to do what one may lawfully do. In other words the rule should be, as was stated in a comparatively recent Minnesota case, that "The number who unite to do an act cannot change its character from lawful to unlawful."[3] All the courts will not admit this fact. Mr. Eddy even goes so far as to say that the law in this country is well settled that parties to a conspiracy may be liable for damages occasioned by acts which if done by an individual would not give rise to a cause of action.[4]

It is true that there is a certain distinction between the acts of an individual and the acts of a combination. It is true that the acts of a combination are "more formidable, more oppressive, harder to resist and therefore more dangerous."[5] We admit the claim of Mr. Justice Lindley that "It is useless to try to conceal the fact that an organized body of men working together can produce results very different from those which can be produced by an individual without that assistance."[6] But, and herein lies the resolvent of the whole question, the difference is only one of degree and not of kind. It is impossible to make a logical distinction between the degrees of the injury that may be inflicted by one or more than one person.

It is true that the use of "unlawful means" is not permissible. But the mere action of a combination as such does not, as has been held in certain English cases,[7] *ipso facto* constitute "unlawful means." It may result in the employment of such means, but this does not necessarily follow.[8]

The typical case in which the question is involved is the modern boycott. The general rule has been that boycotters were liable whenever unlawful means were employed. "Unlawful means" was defined as embracing both actual force and intimidation, and coercion which was held to be a necessary concomitant of combination. The more logical rule as we have seen, is that if a single person might lawfully resort to certain acts, that a combination might with equal lawfulness resort to those same acts. As an individual can, under certain circumstances, peaceably persuade others not to trade with a certain third person, it follows that a combination can do likewise.

But here a vital distinction must be noted. It is held, and rightfully, that neither an individual nor a combination may use even

[1] Hutchins v. Hutchins, 7 Hill, 104; VanHorn v. VanHorn, 56 N. J. L. 318; Brinkley v. Platt, 40 Md. 529.

[2] Hunt v. Simonds, 19 Mo. 583; Tappan v. Powers, 2 Hall, 277; Kimbal v. Harman, 34 Md. 407; Cf. article by Professor J. H. Wigmore in 21 Amer. Law Rev. 509.

[3] Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337.

[4] Eddy, Combinations, § 503.

[5] Andrews J., in Leathem v. Craig, 2 Q. B. D. 667, 676 (1899).

[6] So. Wales Miners' Fed. v. Glamorgan Coal Co. (1905), A. C. 239.

[7] Temperton v. Russell (1893), 1 Q. B. D. 715; Allen v. Flood (1898), A. C. 1, 108.

[8] Bigelow, Torts, sec. 240, 7th Ed.

persuasion unless for the purpose of subserving some lawful purpose, usually a betterment of the condition of the person or persons so acting.[9]

But even those few courts that have been willing to lay down and follow out this rule have not generally ventured to accept its converse upon which it is based, that even one person may not interfere with another, regardless of the means he employs, unless he has a lawful justification for so doing. Thus one person should not be allowed out of mere malice, or even with no feeling of ill-will, to interfere with the business of another to the detriment of the latter.

He should not be permitted to persuade the customers of a merchant to leave him unless for the purpose of benefitting his own business. Especially is this true in view of the fact that the courts in this country have generally refused to follow the doctrine of Allen v. Flood,[10] that the lawfulness of an act cannot be affected by the motive with which it was done.[11]

The attitude of the American courts in refusing as a general rule, to recognize the invasion of rights when affected by an individual in the manner mentioned, may in part be based on the maxim that "*de minimis non curat lex.*" But it is not in such cases that that principle is applicable. The maxim has often been misapplied and its application in this case is without justification.

The real reason for this timidity in sustaining rights of this character seems to lie in the fact that the conception that rights of this nature do really exist is comparatively modern. As civilization advances new rights come to be recognized, the existence of which was not before admitted. It was only the gradual appreciation of the serious injury that was being affected by combinations and the frequent absence of justification therefor, in the realm of morals as well as of law, that has forced the courts to extend their protection to cases of this character. But as the step constituted a radical advance on former notions, the courts have hesitated to apply it where it was not absolutely necessary. As the injury that could be inflicted by an individual was ordinarily of minor importance they accordingly refused to recognize the existence of the right in such cases. But logic calls for its application just as much in the one case as in the other. Undoubtedly in time the haze that at present surrounds the subject will be cleared away, and protection accorded with equal freedom in the two cases.

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[9] Mogul Steamship Co. v. McGregor (1892), A. C. 25, 52; Holmes J., in Vegelahn v. Guntner, 44 N. E. Rep. 1077; Holmes J., in Aiken v. Wisconsin, 195 U. S. 194.

[10] Subsequently modified by Quinn v. Leathem (1901), A. C. 507.

[11] Horan v. Byrnes, 72 N. H. 93, 62 L. R. A. 602; May v. Wood, 172 Mass. 11; Walker v. Cronin, 107 Mass. 555; Cf. article by Professor Ames, in 18 Harv. Law Rev. 411.

THE POWER OF APPELLATE COURTS TO CUT DOWN EXCESSIVE VERDICTS.

The action of many of our appellate courts in cutting down verdicts of juries as excessive is worthy of careful consideration. It would seem that, in this connection many of our courts have almost lost sight of the underlying maxim of our jury system, that "*Ad questionem facti non respondent judices, ad questionem juris non respondent juratores.*" That this maxim is not of universal application was clearly pointed out by Professor Thayer.[1] That it did apply in the case of verdicts rendered by juries, where the element of passion or prejudice was not shown to have entered, and no mistake of law alleged, was unquestioned until the last few years. Theoretically the power of the courts in this respect is the same today, unless changed by statute, as it was a century ago. The change that has taken place in practice is well illustrated by extracts from decisions rendered at different periods in our judicial history. In the case of Townsend v. Hughes,[2] decided in the time of Charles II, a new trial was demanded on the ground that excessive damages had been given. It was refused, one of the judges remarking, "Suppose the jury had given a scandalous verdict for the plaintiff as a penny damages, he could not have obtained a new trial in hopes to increase them; neither shall the defendant in hopes to reduce them."

[1] "Preliminary Treatise on Evidence at the Common Law," ch. 5.

[2] 2 Mod. 150.

In a New York case decided in 1812,[3] the court stated that, "Unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot consistently with the precedents, interfere with the verdict." The rule here laid down was followed unquestioningly until the last few years. The modern tendency is illustrated in a recent Washington case,[4] where the court cut down the verdict, remarking that, "a duty devolves upon the court to restrain juries from awarding verdicts unnecessarily large." No claim was made that the jury had been actuated by passion or prejudice. The old rule was likewise pared down by the California courts until, according to one case, it is sufficient to justify a remission of part of the damages given by a jury if the evidence is "very clear" that an excess has been given.[5] The supreme court thus sets up its opinion as to what is a proper verdict against the opinion of the jury, and declares its intention of overruling the opinion of the jury whenever there is a substantial disagreement. The court considers, not what verdict "might" be given by reasonable men, but what verdict "ought" to be given. The fallacy of this was pointed out by Lord Halsbury in an English case some years ago.[6] If the objection is made that passion or prejudice must be shown, the court will reason thus: "We have examined the evidence and conclude that the verdict given is excessive. Therefore, the jury must have been influenced by passion or prejudice to render such a verdict."[7] In many cases the necessary element of passion or prejudice is absolutely disregarded by the appellate court. It will merely consider the evidence, and if it concludes that the amount of damages given by the jury is excessive, will proceed to cut it down.[8] A distinction is often made between excessive verdicts rendered by mistake and those rendered under the influence of passion or prejudice.[9] It is claimed that an excessive verdict may be honestly rendered by a jury, and that where such is the case, the appellate court may require a remittitur or allow a new trial. Where the damages are liquidated, such a distinction may rightfully be made. But where they are not liquidated and no mistake of law is alleged, the only ground on which the court can require a remittitur is that it disagrees with the jury in regard to the weight to be given to the evidence. This however is not sufficient to justify the intervention of the court. The power to interfere with the verdict of the jury in such a case does not belong to it unless expressly given by statute. This class of cases was entrusted to juries for the very reason that their opinion was regarded as more valuable than the opinion of a court. Where passion or prejudice is shown to have actuated a jury in rendering a verdict, even though the damages are liquidated, some courts will attempt a calculation at the part that such factor has played, and will cut down the verdict accordingly.[10] The same objection exists to such action that was mentioned in the former case. The verdict of a court is substituted for the verdict of a jury. The additional and more vital objection exists that if passion or prejudice is found, the verdict is vitiated, that the discovery of one of those elements *ipso facto* nullifies the verdict and renders it incapable of lawful ratification, even in part. An interesting answer was made to this objection by a Tennessee court. It was there held that if a reduction in the verdict was made with the assent of the plaintiff, that the verdict was thereby "purged of its taint."[11] But if passion or prejudice actuated the jury in the formation of its verdict the court has no right to attempt such calculation as to the part played by those elements, and frame a verdict accordingly. As was said in a Missouri case,[12] the court has "no scales by which it can determine what portion is just, and the result of reason, based upon the evidence and what part

[3] Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 45; Acc. Coffin v. Coffin, 4 Mass. 1; Collins v. Council Bluffs, 32 Iowa, 324.

[4] Hart v. Cascade Lumber Co., 39 Wash. 279.

[5] Trabing v. Cal. Nav. & Imp. Co., 65 Pac. 478. (Not reprinted in full in Cal. Reports).

[6] Metropolitan R. Co. v. Wright, 11 App. Cases, 152.

[7] Cf. Chicago & N. W. R. Co. v. Jackson, 55 Ill. 128.

[8] Cf. Gallamore v. Olympia, 34 Wash. 390.

[9] Enc. of Pl. & Pr., vol. 18, p. 144.

[10] Trow v. Village of White Bear, 78 Minn. 432, 80 N. W. Rep. 1117; Baxter v. C. & N. W. R. Co., 104 Wis. 307, 80 N. W. Rep. 644.

[11] Telegraph Co. v. Frith, 105 Tenn. 167, 58 S. W. Rep. 644.

[12] Gurley v. Mo. Pac. R. Co., 104 Mo. 211. Subsequently overruled by Burdict v. Mo. Pac. R. Co.

is poisoned by prejudice and passion."

The real reason for this tendency on the part of our appellate courts to reduce verdicts, is expressed by Justice Marshal of Wisconsin, that it should be taken as indicating that "our jurisprudence is still developing towards the ideal of perfection where the administration of the law is truly the administration of justice," and not as "a tendency to narrow or invade the functions of the jury."[13] The objections of law and logic are, however, only overridden by such a justification. A disclaimer of any intention to invade the province of the jury does not do away with the facts in the case.

The proper action to take would be to adhere to the law as it exists until a formal change should be made. This change has been made in several states upon the refusal of the supreme court to reduce verdicts without authority for so doing.[14] The matter may not seem of much importance in this particular matter, but it is only by adherence to the law as it actually exists that rights can be secure. A deviation in one respect may serve as a precedent for a deviation in another. The value of a written code of laws is largely impaired if it can be varied at the whim of the courts.

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[13] Baxter v. C. & N. W. R. Co., 104 Wis. 307, 80 N. W. Rep.

[14] e. g. Ill. Tex. La.

CONSTITUTIONALITY OF THE EMPLOYERS' LIABILITY ACT.

HENRY SPAIN v. ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

United States Circuit Court, E. D. of Ark., March 18, 1907.

It is within the power of congress, under the commerce clause, to regulate the liability of a common carrier to its employees for personal injuries received while engaged in interstate transportation.

The Act of Congress of June 11, 1906, relating to the liability of common carriers engaged in commerce between the states to their employees, as stated in its title, commonly called the "federal employers' liability act," is a regulation of interstate commerce, and is within the constitutional power of congress to regulate commerce.

The federal employers' liability act is not void because, as alleged, it applies equally to intrastate and interstate commerce, as its provisions are separable so as to be valid when invoked by an employee engaged on a train actually employed in interstate traffic. The title of the act, which is the best summary of its purpose, removes any ambiguity that may be in the text.

The federal employers' liability act is remedial and not penal, which fact takes it out of the rule laid down in the Trade-Mark cases, 100 U. S. 82, and other cases.

TRIEBER, J.: The constitutionality of the act is attacked upon two grounds: First, that congress has no power to create and enforce liabilities growing out of the employment of servants by carriers, even if those carriers be engaged in interstate commerce; and second, if it has such power, the language of the act is so general as to include intrastate commerce, and both are so inseparably connected as to make the whole act unconstitutional. In passing upon the constitutionality of an act the courts are governed by certain well-settled rules. Statutes are always presumed to be constitutional, and this presumption will be indulged in until the contrary is clearly shown; statutes will be so construed, so far as it is possible to do so, that they shall harmonize with the constitution, to the end that they may be sustained. On the other hand, if the statute is clearly unconstitutional, the duty of the court is to so declare.

1. The power to regulate commerce among the several states is granted to congress by the constitution in terms as absolute as is the power to regulate commerce with foreign nations. Brown v. Houston, 114 U. S. 627, 630; Bowman v. Railway Co., 125 U. S. 465, 482; Crutcher v. Kentucky, 141 U. S. 47, 58; Pittsburg Coal Co. v. Bates, 156 U. S. 477, 578. Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. Hopkins v. United States, 171 U. S. 578, 597. Ever since the decision of Gibbons v. Ogden, 22 U. S. 1, it has been held to be a term of the largest import, comprehending intercourse for the purposes of trade in any and all its forms, including transportation. For a full collation of the authorities on that subject see the Lottery Cases, 188 U. S. 321. Has congress under that provision of the constitution, section 8 of article 1, the power to enact legislation regulating the employment of those necessarily required to manage the vehicles necessary for the transportation of interstate commerce.

That congress has assumed ever since the adoption of the constitution that, under the commerce clause, it possesses the power to regulate the employment of and legislate for the protection of those engaged on the vehicles used for inter-

state transportation is evidenced by the fact that the first congress which met after the adoption of the constitution enacted a statute for the regulation and protection of those employed on merchant vessels, then practically the only means of transporting passengers, as well as goods and merchandise, in interstate or foreign commerce. By the act of July 20, 1791, 1 Stat. L. 131, the employment of seamen on the vessels engaged in interstate commerce was regulated, and from time to time congress has added to and changed these acts. As late as 1852, Mr. Justice Curtis, in Cooley v. Board of Wardens, 53 U. S. 299, 316, stated that the validity of these acts had never been questioned. That the power of congress to regulate navigation depends solely on the commerce clause is beyond question. In Gibbons v. Ogden, the question before the court was whether an act of the legislature of the State of New York granting an exclusive right to navigate the waters of the state was repugnant to the national constitution, and its invalidity was placed solely on the ground that navigation is commerce and therefore within the grant to congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes." In every case decided by the supreme court, as well as every other national court since then, the validity or invalidity of every act of congress in any wise affecting navigation has been determined solely upon the commerce clause. To cite all these cases would serve no useful purpose; but an examination of a few of the most important cases will show that this is one of the few rules of law upon which there is not even an apparent conflict among the decisions of the courts. United States v. Coombs, 12 Pet. 78; Cooley v. Board of Wardens, 53 U. S. 299; Pennsylvania v. Wheeling Bridge Co., 59 U. S. 421; Foster v. Davenport, 63 U. S. 244; Gilman v. Philadelphia, 70 U. S. 713; The Daniel Ball, 77 U. S. 557; Miller v. Mayor, 109 U. S. 385; Patterson v. Bark Eudora, 190 U. S. 169; North Bloomfield, etc., Co. v. United States, 88 Fed. Rep. 664, 32 C. C. A. 84; The Chusan, 2 Story, 455, Fed. Cas. No. 2717.

Mr. Justice Story, in his great work on the Constitution, section 1062, says on that subject: "If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government; it has been exercised with the consent of all America; and it has been always understood to be a commercial regulation. The power over navigation, and over commercial intercourse, was one of the primary objects for which the people of America adopted their government; and it is impossible that the convention should not so have understood the word 'commerce,' as embracing it. Indeed, to construe the power so as to impair its efficacy would defeat the very object for which it was introduced into the constitution; for there cannot be a doubt, that to exclude navigation and intercourse from its scope would be to entail upon us all the prominent defects of the confederation, and subject the Union to ill-adjusted systems of rival states, and the oppressive preferences of foreign nations in favor of their own navigation." In The Chusan, Mr. Justice Story, in speaking of that subject, says: "The power to regulate commerce includes the power to regulate navigation with foreign nations and among the states; and it is an exclusive power in congress. This I conceive has been fully established by the supreme court in Gibbons v. Ogden, 9 Wheat. 193; and the doctrine stands, as I conceive, upon grounds which cannot be shaken, without endangering the interests of the whole Union, if not the very existence of the constitution as a frame of government for the professed objects and purposes, which it was intended to accomplish. Now, there cannot be a doubt, that the prescribing of rules for the shipping of the seamen, and the navigation of vessels engaged in foreign trade, or trade between the states, is a regulation of commerce. In what respect does the exercise of a power to regulate, control, or extinguish the liens given by the maritime law for material-men upon foreign vessels differ from the power to regulate the shipping of seamen or the navigation of foreign vessels? Each is a regulation of foreign commerce, or commerce among the states." In the Daniel Ball the act of congress of July 7, 1838, 5 Stat. L. 304, and the amendatory act of August 30, 1852, 10 Stat. L. 61, imposing a penalty on steam vessels to transport passengers or freight on any of the navigable waters of the United States, without first having procured a license and complied with other provisions of the acts of congress, were before the court. The issues determined were what constituted navigable waters of the United States, subject to the control of congress, and it was unanimously held: "And they constitute navigable waters of the United States within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." And on page 565 the court say: "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress." In North Bloomfield, etc., Co. v. United States, an act of congress regulating hydraulic mining in California, to the end that navigable waters should not be obstructed, was at-

tacked as unconstitutional. But the United States Circuit Court of Appeals for the ninth circuit, in overruling this contention, held that the power of congress to pass the act in question under the commerce clause was undoubted.

But it is claimed that such legislation can only be sustained under the police power; that that power is vested in the states solely and not in the general government, and therefore a regulation for the protection of employees, such as is attempted to be given by this act, can only be exercised by the states. That congress might legislate under the commerce clause touching liability for torts or the protection of the passengers and employees has been intimated by the supreme court in a number of cases. In Sherlock v. Alling, 93 U. S. 109, it was said: "It is true that the commercial power conferred by the constitution is one without limitation. It authorized legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed. * * * Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life. The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of congress are silent, and the laws of the state govern. * * * Until congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the person injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of congress." In Smith v. Alabama, 124 U. S. 465, 479, a statute of the state requiring locomotive engineers to be examined and licensed by the state authorities was attacked as unconstitutional, so far as it applied to engineers in charge of locomotives engaged in interstate commerce. In sustaining the constitutionality of the act, Mr. Justice Matthews, who delivered the opinion of the court, said: "It would, indeed, be competent for congress to legislate upon its subject matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce." In Railroad Co. v. New York, 165 U. S. 628, 632, the validity of the statute of the state of New York regulating the heating of steam passenger cars on trains, including those engaged in interstate traffic, was before the court, the contention being that the statute was repugnant to the commerce clause of the National Constitution and it was held until displaced by such national legislation as congress may rightfully establish under its power to regulate commere with foreign nations and among the several states its validity of the statute so far as the commerce clause of Constitution of the United States is concerned, cancannot be questioned." In Chicago, etc., Railway Co. v. Solan, 169 U. S. 133, 137, the court say: "So long as congress has not legislated upon the particular subject, they (the statutes of the state) are rather to be regarded as legislation in aid of such commerce, etc." In Western Union Telegraph Co. v. James, 162 U. S. 650, 661, the same rule was applied to state legislation affecting telegraph companies.

But if there ever was any room for doubt as to the power of congress to enact such legislation, it has been removed by what was decided in Patterson v. Bark Eudora, 190 U. S. 169, 175. In that case the constitutionality of the act of congress of December 21, 1898, 30 Stat. L. 755, 763, making it unlawful to pay seamen wages in advance, was questioned. It was contended: "That even if the contract be one subject to restraint under the police power, that power is vested in the states and not in the general government, and any restraint, if exercised at all, can only be exercised by the state in which the contract is entered into; that the only jurisdiction possessed by congress in respect to such matters is by virtue of its power to regulate commerce, interstate and foreign; that the regulation of commerce does not carry with it the power of controlling contracts of employment by those engaged in such service, any more than it includes the power to regulate contracts for service on interstate railroads, or for the manufacture of goods which may be intended for interstate or foreign commerce."

But Mr. Justice Brewer, in answer to this contention, said: "Neither do we think there is in it any trespass on the rights of the states. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the state. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a state, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single state and in an ocean voyage." The expression of the court that "contracts with sailors for their services are exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water," must be understood to refer solely to the propriety of the legislation and

not the power, for no one will contend now that the commerce clause of the constitution grants greater power to congress over the commerce carried on by water than over that transported by land. This very question was before the court In *Re* Debs, 158 U. S. 568, 589, and the court there said: "It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways—the natural highways of the country—and not over artificial highways, such as railroads, but the occasion for the exercise by congress of its jurisdiction over the latter is of recent date," and after discussing the subject fully, the court concludes, on page 591: "The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." In the Lottery Cases, 188 U. S. 321, 356, Mr. Justice Harlan said: "In this connection it must not be forgotten that the power of congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the constitution." And in Addyston Pipe and Steel Co. v. United States, 175 U. S. 211, 229, the same objection was made that the Sherman anti-trust act of July 2, 1890, was an interference with the rights to contract, but was by the court overruled. In White's Bank v. Smith, 74 U. S. 646, the act of July 29, 1850, providing for the recording of vessels, was sustained as a proper exercise of the powers of congress under the commerce clause of the constitution. And so was the limited liability act of congress sustained in Providence, etc., Co. v. Hill, 109 U. S. 578, and in United States v. Boston and Albany Railroad, 15 Fed. Rep. 209. Section 4386, Revised Statutes, regulating the transportation of live stock, was sustained under the commerce clause. In the United States v. Freight Association, 166 U. S. 290, 312, the court says: "Railroad companies are instruments of commerce, and their business is commerce itself. State Freight Tax Case, 15 Wall. 232, 275; Telegraph Co. v. Texas, 105 U. S. 460, 464. An act which prohibits the making of every contract, etc., in restraint of commerce among the several states, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of comerce between the states, provided such contract by its direct effect produces a restraint of trade or commerce." These authorities clearly sustain the power of congress under the commerce clause of the constitution to legislate for the safety and protection of employees engaged in interstate commerce, whether the transportation be by water or land.

2. Does the act also regulate interstate commerce, and if so, is the latter so inseparably connected with the other as to condemn the entire act? Assuming, but not deciding, that the act is broad enough to include all servants of a common carrier engaged in interstate trade, including those employed solely in transportation within one state and others not employed in transportation at all, the main question is whether it is not separable so as to be valid when invoked by one engaged on a train actually employed in interstate traffic, as the plantiff alleges in his complaint he was at the time of the injury. The authorities relied upon by learned counsel for the defendant to sustain their contentions are United States v. Reese, 92 U. S. 214; Trade-Mark Cases, 100 U. S. 82; United States v. Harris, 106 U. S. 629; Baldwin v. Franks, 120 U. S. 678; and the Virginia Coupon Cases, 114 U. S. 269. A careful examination of the first four cases will show that the acts construed and declared invalid in those cases were all penal statutes, and that the court laid great stress on that fact. In United States v. Reese, which was an indictment under the national election laws, the court say: "We are, therefore, directly called upon to decide whether a penal statute, etc." In the Trade-Mark Cases the parties were indicted for violations of the trade-mark statute. In that case, in answer to the contention of the counsel for the government, that as congress had power to regulate trade-marks used in commerce with foreign nations and among the several states, these statutes should be held valid in that class of cases, if no further, the court said: "To this there are two objections: First, the indictment in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give the words used by congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. In United States v. Harris the defendant was indicted under the provisions of section 5519 of the Revised Statutes, and the court followed the rule announced in United States v. Reese, citing the excerpt from that case hereinbefore set out as the reason for its conclusions. Baldwin v. Franks was also a criminal case for violation of section 5519, Revised Statutes, the statute declared unconstitutional in the Harris case, the court saying on the subject of separability: "This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite another question, and one we are not now called on to decide. In that case, the court, in distinguishing Packet Co. v. Keokuk, 95 U. S. 80, said: "That was not

a penal statute, but only a city ordinance regulating wharfage, and the suit was civil in its nature." That the employers' liability act is a remedial and not a penal act must be deemed to have been settled by Johnson v. Southern Pacific Railway Co., 196 U. S. 1. The only other case cited is the Virginia Coupon Cases. Those were civil actions arising out of the bond legislation of that state. The various acts before the court in that case were, as said by the court, "but a single scheme the undisguised object of which is to enable the state to rid itself of a considerable portion of its public debt and to place the remainder on terms to suit its own convenience, without regard to the obligation it owes to its creditors," and the court held: "The scheme of the whole is indivisible. It can not be separated into parts. It must stand or fall together. The substantive part of it, which forbids the tax collector to receive coupons in payment of taxes, as we have already declared, as, indeed, on all sides is admitted, cannot stand, because it is not consistent with the constitution. That which is merely auxiliary to the main design must also fall with the principal of which it is merely an incident." The correctness of that decision upon the facts is unassailable, as it is based upon the well-settled rule that a statute in part unconstitutional, if the provisions are so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are dependent, conditional or connected must fall with them. Allen v. Louisiana, 103 U. S. 80. But it is equally well settled that if a part of a statute is unconstitutional, the remainder is not void unless all the provisions are connected in the subject-matter, dependent on each other, operating together with the same purpose, or otherwise are connected together in meaning that it can not be presumed that the legislature would have passed one without the other. Packet Co. v. Keokuk, 95 U. S. 80; Tiernan v. Rinker, 102 U. S. 123; Unity v. Burrage, 103 U. S. 447; Railroad Co. v. Schutte, 103 U. S. 118, 142; McCullough v. Virginia, 172 U. S. 102, 112. In McCullough v. Virginia, the court, in passing upon this question, declared the true rule to be: "It is elementary law that every statute is to be read in the light of the constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. In Railroad Co. v. Schutte, the court said: "Under these circumstances, etc., the striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision and reading the statute as if the provision was not there."

Applying these rules to the act before the court, is there any room for the presumption that congress would not have passed the act unless it could be applied to all employees, including those not engaged on trains employed in interstate transportation or not engaged in transportation at all? If the act itself is ambiguous on that subject, reference to the title will at once remove it. That title is "an act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the states and foreign nations." That in cases of this kind the title of the act, as well as the circumstances surrounding its enactment, as exhibited in public documents, may be referred to is well settled. Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 563; Johnson v. Southern Pacific Railway Co., 196 U. S. 1, 19; Petri v. Creelman Lumber Co., 199 U. S. 487, 495; Millard v. Roberts, 202 U. S. 429. 437. In Millard v. Roberts the court say: "The title of the acts are the best brief summary of their purpose. Another rule of law applicable to the case at bar is that courts will not listen to an objection made to the constitutionality of an act by a party whose right it does not affect in the particular case on trial, and who has, therefore, no interest in defeating it. Supervisors v. Stanley, 105 U. S. 305, 311; *In re* Garnett, 141 U. S. 1, 12; Clark v. Kansas City, 176 U. S. 114, 118; Patterson v. Bark Eudora, 190 U. S. 169, 176. In Clark v. Kansas City the court approved the ruling of the Supreme Court of Kansas that 'a court will not listen to an objection made to the constitutionality of an act by a party whose right it does not affect and who has, therefore, no interest in defeating it,'" the court saying: "We concur in this view, and it would be difficult to add anything to its expression." In *Re* Garnett it was held that, "it is unnecessary to inquire whether the section is valid as to all kinds of vessels named in it; if it is valid as to the kind to which the steamboat Katie belongs it is sufficient for the purpose of this case." In Patterson v. Bark Eudora, Mr. Justice Brewer said: "We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a state, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single state and in an ocean voyage." So, as stated by Judge Cooley: "A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. * * * If there are any ex-

ceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others." Cooley Const. Lim., p. 250, 7th Ed. So, in the case at bar, the injury suffered by the plaintiff, as alleged in the complaint, was while he was engaged in labor performed on a train engaged in interstate commerce, and therefore brings this case within the foregoing rules of law.

For these reasons, I am of the opinion that the act is constitutional.

NOTE.—The opinions of the United States courts stand evenly divided on the question of the constitutionality of act involved in the principal case. The opinion is an able one and exhausts the cases on the questions considered. There is nothing to add to it. The opinion agrees with that expressed by us in a note to Mr. Justice Evan's opinion.

JETSAM AND FLOTSAM.

DELMAS V. JEROME.

William Travers Jerome, accentuates his somewhat exclusive knowledge of the law of New York, in his ironical retorts to Mr. Delmas. Mr. Delmas seems, however, quite able to stand up under the fury of the onslaught and may be deemed to have done right well with his shield of common sense and buckler of fundamental principles. It is quite certain that he is having the time of his life trying to harmonize the "law of New York" from its various authors and courts; these gave the very able court of Florida no end of trouble and actually misled it to a certain extent. 64 Cent. L. J. 169. It is certain that he who knows the laws of New York is entitled to marked distinction, not alone on this mundane sphere, but when his spirit shall have passed over with Charon to that bourne whence "no traveler returns" and arriving on the other shore he will find awaiting him the Shades of Cicero, Ulpian and Bacon, to conduct him to the solitudes of Solomon, who will respectfully step down from his throne, and in the midst of a vast concourse of immortals, assist in placing this most distinguished Shade from New York on the throne he is no longer worthy to occupy—exit Shade of Solomon.

THE DOCTRINE OF SCIENTER, ITS EXCEPTIONS, AND THE REASON FOR ITS EXISTENCE, IF ANY—ENGLISH CASES.

The liability of the owner of a horse, dog, bull, or other animal of a like character, where the animal kicks, bites, or gores, is founded on an artificial rule, and one the reasonableness of which is perhaps more than questionable. The rule is that scienter or knowledge of the ferocious character of the animal is necessary on the part of the owner before liability for the injury can be established. This has been so long admitted (it is to be found in almost the words of our judges today in the Roman law, from which our early English judges no doubt borrowed it), that any change in it unless by statutory enactment is scarcely to be hoped for.

That the reckless or willful doing of an act amounting to a tort and causing damage, is necessary, will not now be contended. I am equally liable for an assault where it is involuntary, as where I so commit it with the greatest malevolence, laying out of sight the criminal law and the *quantum* of damages. I am equally liable to A where my cattle go upon his lands and destroy his crops; where (1) I drive them there; (2) where they get there through my ill-kept fence; and (3) where B willfully or negligently lets down the bars of my fence in trespassing on my lands and altogether against my will.

Lord Blackburn in Smith v. Cook (1875), 1 Q. B. D. 79, at p. 83, says: "The doctrine of scienter, which depends mainly on authority, ought not to be extended." etc. It may be interesting and profitable to see how the doctrine has been limited by recent decisions. Patterson v. Fanning (1901), 1 O. L. R. 412, decides that where an animal, a horse, doing the damage, was unlawfully, contrary to terms of a city by-law, at large on the highway, and this through the negligence of the owner, though this latter fact seems in reason to be hardly material to the issue, the owner was liable without proof of knowledge of vice. In Ellis v. Loftus Iron Co. (1875), L. R. 10 C. P. 10, where the animal, a stallion, trespassed by putting his head and afterwards or before, which does not appear, his heels, through the dividing fence and over the close of the plaintiff, and bit and kicked the plaintiff's mare, it was held that the defendant was liable, although it was shown that so far from being vicious to the owner's knowledge, he was known to be an animal of extremely mild disposition. In Smith v. Cook (1875), 1 Q. B. D. 79, it was held that the defendant, an agister, without proof of scienter, was liable to the plaintiff, the owner of a young horse placed with the agister for pasturage, which was gored to death by one of the defendant's bulls which had been left in the adjoining close, from which it could and did make its way into the pasture where the plaintiff's horse was.

The doctrine of scienter, if it can rationally be supported at all, is to be so supported, not on the ground that the owner is not responsible for the tortious acts of his animals precisely as he would be for his own, but that the acts to which the doctrine applies are not the natural result of the keeping of such animals, and that consequently the damages are too remote. Though not a case of damage by an animal (Pearce v. Sheppard (1893), 13 C. L. T. Occ. N. 403, 24 O. R. 167), invokes the same principle of law as Smith v. Cook, This was also a case of an agister, who had left near the pasture a well the covering of which, planks, had in the natural course of events become rotten and unsafe, although the agister was not aware of this fact. A horse which was being agisted found its way to the well and broke through the covering and was killed or injured. The trial judge nonsuited the plaintiff on the ground that he failed to prove that the defendant was aware of the condition of the covering of the well. A divisional court, Boyd, C., Ferguson and Meredith, JJ., directed a new trial, holding that there was evidence to go the jury of negligence; Meredith, J., dissenting on this ground and holding with the trial judge. It is to be noted that the head-note of the report is erroneous in stating that there was knowledge on the part of the defendant. As before said, Meredith, J., dissents from the other members of the court, he holding that knowledge was necessary.

It seems hard to distinguish from Ellis v. Loftus

Iron Co. the case of Cook v. Waring (1863), 2 H. & C. 332, which was a case in which the defendant's sheep affected with scab escaped from his pasture, trespassed on the plaintiff's close, and infected his flock of sheep, the defendant not being aware that his sheep were so infected. It was held in the latter case that the damage, the carrying and giving the disease, was not the natural consequence of the trespass under the circumstances, and the damage was too remote. This ground was not raised nor this case cited in Ellis v. Loftus Iron Co.—*Canadian Law Times.*

DAMAGES FOR INDIGNITY TO DEAD BODY.

In Lindh v. Great Northern Ry., in November, 1906, 109 N. W. Rep. 823, it was held by the Supreme Court of Minnesota that an action *ex delicto* to recover damages for injured feelings lies at the suit of the husband, against a common carrier, for soiling and ruining the casket containing the body of his dead wife, and for mutilating and disfiguring the corpse by negligently and wilfully exposing it to rain. The court said in part:

"This case is concluded by Larson v. Chase, 47 Minn. 307, 50 N. W. Rep. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. It was there held: The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband, or wife or next of kin. This right is one which the law recognizes and will protect, and for any infraction of it, such as an unlawful mutilation of the remains, an action for damages will lie. In such an action a recovery may be had for injury to the feeling and mental sufferings resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved. That case was followed and approved, for example, in Foley v. Phelps, 1 App. Div. 551, 37 N. Y. Supp. 471. In Korber v. Patek, 123 Wis. 453, 102 N. W. Rep. 40, 43, 68 L. R. A. 956, Mr. Justice Dodge says of Larson v. Chase and Foley v. Phelps, after citing them and other cases: 'The first two—and especially the first—of these cases may be considered leading, as they have been cited as the basis for most of the later ones upon this immediate subject, and in many others approaching it.' Later in the opinion he says: 'In Larson v. Chase, *supra*, the remarks of Mitchell, J., on this subject, sentimental damages, are so philosphical that we cannot forbear quoting them. Scores of the cases in which Larson v. Chase has been followed and approved will be found collected in volume 2 of L. R. A. cases as authorities, at pages 776 and 777. Modern text writers with no known exception recognize it as a leading authority on the subject, and as announcing the true principle.' That this decision accords with the spirit of the earlier law on this subject is demonstrated in an article by Mr. Justice Elliott, of this court, in 16 Cent. L. J. 161, and see Perley on Mortuary Law, ch. 4, p. 20, *et seq.*

No good reason is assigned for reversing that decision or for differentiating it from the case at bar. Injury to the feelings of the family of deceased springs as naturally from disfiguration and mutilation of the body by exposure to the elements as by dissection. Nor is there any merit in the contention of the defendant that this was an action on the contract, and that, therefore, there could be no recovery for mental anguish because of the breach of contract. The plaintiff is right in his insistence that the present case sounded in tort. It is elementary 'that a tort is a violation of legal duty and may involve as one of its elements a breach of contract.' Rich v. N. Y. C. & H. R. R. R., 87 N. Y. 382; Chase's Lead. Cas. 56, and see Mykleby v. C., St. P., M. & O. R. R., 39 Minn. 54, 38 N. W. Rep. 763; Railway Co. v. Spirk (Neb.), 70 N. W. Rep. 927. The complaint set forth a cause of action in *quasi* tort at least, for which an action *ex delicto* lies. 1 Jaggard on Torts, 12 *et seq.* L. & N. R. R. v. Wilson, 123 Ga. 62, 51 S. E. Rep. 24, which also approves Larson v. Chase, is on all fours with the instant case. There the declaration alleged that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over the railroad to a junction, and thence by a branch of the same road to the destination; * * * that on arrival at the junction the company's agent had the coffin and body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it would have been protected from the weather, and that the coffin and shroud were damaged to the extent of $75, and the body was 'soaked and otherwise mutilated;' it was held that the declaration stated a cause of action."

As shown by the above extract, Larson v. Chase, 47 Minn. 307, has become a leading case on the subject, having been very extensively followed throughout the Union. Its doctrine was accepted in New York not only in Foley v. Phelps, 1 App. Div. 551, but in Jackson v. Savage 109 App. Div. 556.

We concur with the Minnesota court in the view that there is no difference in principle between deliberate mutilation of a corpse and negligently suffering it to be soiled and disfigured by the action of the elements. The gravamen of the recovery in such cases will be for mental suffering, and it is to be noted that the courts neither of Minnesota nor New York have accepted the "Texas doctrine" allowing suit for mental suffering sustained through the non-delivery of a telegram. To the lay mind it will doubtless seem arbitrary that damages may be had for permitting the remains of a relative to be disfigured, while no recovery is authorized for failure to deliver a message which would have enabled surviving relatives to be with the deceased in his last moments or to have attended his funeral. The reasons for the distinction are founded on public policy, as has been frequently explained; recognition of the "Texas doctrine" leads to such practical abuses that it is better, on the whole, not to permit it to gain a foothold.

There is sufficient technical distinction between the two lines of cases, and the possibilities of abuses under the "Minnesota doctrine" are not very great. In cases of indignity to the remains of the dead there is physical injury as a foundation for the recovery for mental suffering, although such injury is not personally to the plaintiff. Both Foley v. Phelps, *supra*, and Jackson v. Savage, *supra*, were cases on demurrer, so that the question of the measure of damages has not been elaborately discussed in New York. In Foley v. Phelps, *supra*, it was remarked at the close of the opinion: "It is there also held in Larson v. Chase, *supra*, that the rule of damages would allow a recovery for mental suffering and for injury to the feelings occasioned directly by the unlawful mutilation, although no actual pecuniary loss or damage was proven. It is not for us at this time to express any opinion with respect to the measure of damages in a case of this kind; but we are satisfied that the action will lie, and will be in favor of the widow under the circumstances disclosed by this complaint."

We do not think that there is much doubt that the New York courts would hold that damages might be recovered for mental suffering without proof of pecuniary loss if that question were squarely presented. As the matter is discussed by Mitchell, J., in Larson v. Chase, *supra*, the theory of recovery was that the defendant's wrongful act entitled plaintiff to at least nominal damages, and that damages for the mental suffering properly followed. According to the weight of authority, punitive damages may be founded on merely nominal damages, and as actions for mutilation of or indignity to a corpse are quite essentially punitive the "Minnesota doctrine" is well within legitimate analogies of the law.—*New York Law Journal.*

BOOK REVIEWS.

THE HERSCHLER LAWYERS' TRIAL DOCKET

There have been many trial dockets devised but none which we could with as good conscience recommend as we can that which goes under the name of the Herschler Lawyers' Trial Docket. It is, indeed, quite the ideal of a convenient docket for the general practitioner, and will save him many days and nights of toil and anxiety. The page is about the size of an ordinary law book page and each case takes two pages. The ruling goes across both pages so that when the book is opened it gives the effect of one large page. The first ruled subdivision is provided for stating the court which has jurisdiction of the cause and the date of the filing of the petition and answer. The next ruled subdivision is one which requires a statement of the parties plaintiff and defendant to the action, the trial number of the case, the basis of the cause of action, the nature of the defense made, the names and addresses of plaintiff's and defendant's counsel, the date or dates on which the case is set for trial and the date or dates the case has been continued. The third ruled subdivision is for a memorandum on one side of the names and addresses of plaintiff's witnesses, and on the other, the names and addresses of defendant's witnesses. The fourth ruled subdivision is for memoranda of authorities, statements of witnesses and other important memoranda connected with the trial of the case. The fifth subdivision, extending across the bottom of the two pages is for recording the date and amount of judgment recovered, and for whom, when execution issued and to whom and amount collected on judgment from time to time. There are 254 actual pages or 127 double pages offering provision for recording 127 cases. We can heartily recommend it.

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HUMOR OF THE LAW.

"Were there any marks on your body when the doctor examined you?" asked the attorney of the witness.

"None except a birthmark, if that's what you mean," was the flip answer.

"No, I don't mean that, unless you got it at the time of the accident."

A blow directed against the character of a witness recoils often on the examiner.

"You were in the company of these people?" he was asked.

"Of two friends, sir."

"Friends? Two thieves, I suppose you mean."

"That may be true," was the dry retort; "they are both lawyers."

W. Bourke Cockran, at a lawyers' banquet in New York, deprecated long speeches.

"He who makes short speeches," said Mr. Cockran, "will never find himself in the embarrassing position of a friend of mine last month.

My friend, when a certain case of his was called, rose and pleaded in a husky voice for an adjournment.

"On what ground?" asked the judge.

"'Your honor,' was the reply, 'I have been making an address in another court all the morning, and find myself completely exhausted.'

"'Very well,' said the judge; and he called the next case.

"Another counsel rose and in his turn asked for an adjournment.

"'Are you exhausted, too?' said the judge. 'What have you been doing?'

"'Your honor,' was the answer, 'I have been listening to my learned brother.'"

THE DIFFERENCE IN VALUE BETWEEN A LAWYER AND AN EDITOR.

"What's th' use iv a lawyer annyhow? If I get a good wan ye may hire a betther. Th' more money a man has th' betther lawyer he can get, but th' more money a man has th' worse iditor he's liable to get. All anny lawyer can do is to holler at another lawyer. All a judge can do is to look unpleasant an' dhrop off into dhreams just at th' time whin th' most excitin' ividence in ye'er favor is bein' put in. No, sir, lawyers an' judges don't amount to annything. 'Tis th' twelve good men an' thrue dhragged fr'om butcher shop an' grocery store that decides. It's th' intilligent jury iv ye'er peers or worse that tells ye whether ye must put in th' rest iv ye'er days stickin' paper insoles into ready made shoes or wearin' out th' same lookin' f'r wurruk. Th' lawyer makes th' law; th' judges make th' errors, but th' iditors make th' juries.

So whin ye're landed down stairs, in th' police station an' ye sind f'r ye'er friends ye say to thim: 'Boys, ye needn't trouble ye'ersilf about what lawyer ye get so long as he's cheap; but do ye go down to th' iditor an' tell him that th' cause iv human freedom is on thrile undher the *nom de ploom* iv Malachi Hinnissy,' says ye. An' whin ye come up f'r thrile th' lawyer tells ye th' case looks bad f'r ye but he'll thry to save ye; an' ye give him th' wink an' set serene f'r well ye know that iviry wan is thim sworn boolwarks iv justice facin' ye has been told ivry dar f'r two months that it is insanity but not crime to steal a ham, an' over th' honest heart iv each iv them is a copy iv the Daily Kazoo offerin' a season ticket to th' baseball game to the juror that gives th' best reason why th' pap'lar Malachi Hinnissy shuld be acquitted (cut out this coupon). An' afther th' lawyers on both sides has pounded th' furniture to pieces an' the judge has read a little composition on larceny fr'm th' third reader, th' jury gives a roar iv 'not guilty' an' thin adjourns with th' judge, th' bar an' th' pris'ner to th' office iv the Kazoo to have their pitchers taken."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. APPEAL AND ERROR—Assignment of Error.—Where an assignment of error is not stated as a proposition in itself and cannot be so stated properly, and there is no proposition stated under it, the assignment is not reviewable.—Kirby Lumber Co. v. Chambers, Tex., 95 S. W. Rep. 607.

2. APPEAL AND ERROR—Failure to Take Exceptions.—The denial of a motion to strike a part of a count held not reviewable where there was no exception to the ruling reserved by the bill of exceptions.—McCleskey & Whitman v. Howell Cotton Co., Ala., 41 So. Rep. 67.

3. APPEAL AND ERROR—Orders Entered after Final Decree.—The court on appeal from a decree cannot review an order denying a petition by the defeated party, made at a term subsequent to the one at which the decree was rendered.—Gilbreath v. Farrow, Ala., 41 So. Rep. 1000.

4. APPEAL AND ERROR—Order Granting New Trial.—Where the court granted plaintiff's motion for a new trial for error in sustaining defendant's motion for a nonsuit at the close of plaintiff's case, an appeal from such order presented questions of law only.—Doyle v. Great Northern Ry. Co., Wash., 86 Pac. Rep. 861.

5. APPEARANCE—Waiver.—A corporation's objection to the court's jurisdiction of its person raised *in limine* and maintained throughout the proceedings held not waived by its appearance. — Spratley v. Louisiana & A. Ry. Co., Ark., 95 S. W. Rep. 776.

6. ASSAULT AND BATTERY—Prosecution for Aggravated Assault.—On a prosecution for an aggravated assault arising from an altercation on a meeting of the parties driving wagons held error to admit evidence as to a custom whereby a loaded wagon has the right of way.—Tubbs v. State, Tex., 95 S. W. Rep. 112.

7. ASSIGNMENTS—Equitable Assignees.— Where heirs of an intestate paid a portion of a mortgage on the intestate's residence by procuring an assignment of a mortgage and note to their sister, they became equitable assignees of the mortgage lien and claim.—*In re* Heeney's Estate, Cal., 86 Pac. Rep. 842.

8. ASSIGNMENTS—Pre-Existing Debt as a Consideration.—A pre-existing debt held a sufficient consideration for the assignment of moneys which might become due as commissions or profits.—Bank of Yolo v. Bank of Woodland, Cal., 86 Pac. Rep. 820.

9. BANKRUPTCY—Insolvency. — The remedy of a buyer on the failure of the seller to complete the contract held at law, notwithstanding the insolvency of the seller.—Block v. Shaw, Ark., 95 S. W. Rep. 806.

10. BANKRUPTCY—Property of Bankrupts. — On the close of a bankruptcy proceeding, the property of the bankrupt undisposed of reverts to him or those entitled to his estate.—Hunter v. Hodson, Tex., 95 S. W. Rep. 637.

11. BURGLARY—Railroad Cars.—In a prosecution for burglary of a foreign railroad car, the ownership of the car held properly laid in the railroad that was using it at the time of the burglary.—Burrow v. State, Ala., 41 So. Rep. 987.

12. CARRIERS—Ordinary Care. — A carrier is usually only required to use ordinary care and diligence under all the circumstances to avoid delay in transporting cattle to market.—Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland, Tex., 95 S. W. Rep. 747.

13. CARRIERS—Records as Best and Secondary Evidence.—Where the records of a railroad company are made in duplicate or triplicate they are each primary evidence of their contents and each is admissible without producing the others, or accounting for their absence.—Hopkins v. State, Fla., 42 So. Rep. 52.

14. CARRIERS—Sale of Rejected Freight. — A state statute regulating the sale of rejected freight by a carrier held to supercede the common law and render illegal a sale violating such statute.—St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co., Tex., 95 S. W. Rep. 656.

15. CARRIERS — Specific Cause of Death. — A carrier held not required to show the specific cause of the death of an animal during transportation in order to be relieved from liability therefor. — Thomas v. Wells-Fargo Express Co., Tex., 95 S. W. Rep. 723.

16. CHATTEL MORTGAGES—Foreclosure.—In action to foreclose mortgage, instruction that, if parties agreed that amount to be advanced by plaintiffs for the development of a mine should not exceed $60,000, the plaintiff was entitled to recover, held not erroneous in view of the evidence.—Carrera v. Dibrell, Tex., 95 S. W. Rep. 628.

17. CONSTITUTIONAL LAW—Grant of Charter to Corporation.—The grant of a charter to a corporation and its acceptance creates a contract within the protection of the constitutional inhibition as to laws violating the obligation of the contracts.—State v. Chicago & N. W. Ry. Co., Wis., 108 N. W. Rep. 594.

18. CONSTITUTIONAL LAW — Police Power.—Cr. Code 1896, § 4762, making it an offense to knowingly sell a horse having the disease of choking, having for its purpose the prevention of fraud, held a proper exercise of the police power.—Wester v. State, Ala., 41 So. Rep. 969.

19. CORPORATIONS — Action to Enforce Stockholder's Liability.—As against a creditor of the corporation, a stockholder is estopped to set up in defense of his stockholder's liability that he purchased the stock for less than its par value, and that hence no recovery can be had owing to the illegality of the transaction.—Vaughn v. Alabama Nat. Bank, Ala., 42 So. Rep. 64.

20. COURTS—Jurisdiction.—Where a defendant is sued for an amount giving the court jurisdiction, the jurisdiction does not fail because a verdict is rendered for plaintiff for a less sum than the jurisdictictional amount.—Braun & Ferguson Co. v. Paulson, Tex., 95 S. W. Rep. 617.

21. COURTS—Jurisdiction of Probate Courts.—Probate courts cannot determine conflicting interests of heirs or lienors in an estate except in an appropriate proceeding and under proper pleadings. — *In re* Heeney's Estate, Cal., 86 Pac. Rep. 842.

22. CRIMINAL EVIDENCE—Capacity to Commit Crime.—A charge as to mental capacity of a boy under 14 to commit a crime held erroneous in fixing the time at the date of the trial instead of at the time of the crime.—Neville v. State, Ala., 41 So. Rep. 1011.

23. CRIMINAL TRIAL—Functus Officio.— Where accused was properly in court, it was immaterial to the court's right to try him that the warrant on which he was arrested was *functus officio*.—Roland v. State, Ala., 41 So. Rep. 963.

24. CRIMINAL TRIAL—Burglary.— Where accused was only sentenced for burglary under a good count in the indictment, he was not prejudiced by a defect in another count attempting to charge grand larceny.—Burrow v. State, Ala., 41 So. Rep. 987.

26. CRIMINAL TRIAL—Prejudice of Community.—An *ex parte* order directing the sheriff of another county to retain custody of accused held not an adjudication that there was danger of violence to him as against the state on the issue of prejudice on an application for change of venue.—Williams v. State, Ala., 41 So. Rep. 992.

27. CUSTOMS AND USAGES—Import Order.—A custom of the trade that an import order is not subject to cancellation held illegal.—Theo. Ollenheimer & Bro. v. Foley, Tex., 95 S. W. Rep. 698.

28. DAMAGES—Mental Suffering.—Mental suffering will be implied from illness accompanied by physical pain.—International & G. N. R. Co. v. Johnson, Tex., 95 S. W. Rep. 595

29. DAMAGES—Negligence of Railroad.—Where a railroad was negligent in failing to put in a farm crossing to enable the land owner to haul wood to market, the latter held entitled to recover profits lost by reason of his inability to haul and sell the wood.—Kendall v. Chicago, R. I. & G. Ry. Co., Tex., 95 S. W. Rep. 757.

30. EMINENT DOMAIN—Rights of Remaindermen.—It was no objection to a remainderman's bill to have the administration of the estate transferred to a court of equity, that the will devised to the administrator a life estate in the property. — Bresler v. Bloom, Ala., 41 So. Rep. 1010.

31. EMINENT DOMAIN—Right to Condemn Land.—A railroad company held entitled to exercise its right of eminent domain and take the rights of a lessee in a public landing pursuant to a lease —Union Ry. Co. v. Chickasaw Cooperage Co., Tenn., 95 S. W. Rep. 171.

32. EMINENT DOMAIN—Use of Highway for Telephone Line.—A telephone line along a highway held not an additional servitude entitling the abutting owner to compensation.—Hobbs v. Long Distance Telephone & Telegraph Co., Ala., 41 So. Rep. 1003.

33. ESTOPPEL—Judicial Sale.—The rule that a levy and sale of property by a person estops him from denying that the other party had a leviable interest therein does not extend to the divestiture of rights under previous sales under different process. — Harris v. Stephenson, Ala., 41 So. Rep. 1008.

34. ESTOPPEL—Sale of Corporate Property.—Breach of a condition subsequent in a deed conveying a street railroad held not to affect title as against certain shareholders in the selling company.—Parker v. Citizens' Ry. Co., Tex., 95 S. W. Rep. 38.

35. EVIDENCE—Cancellation of Case.—Certified copy from state treasurer's office of notice from general land commissioner to state treasurer of cancellation of lease of school land held inadmissible in evidence.—Trimble v. Burroughs, Tex., 95 S. W. Rep. 614.

36. EVIDENCE — Official Signatures.—Courts held to know whether the officer by whom writs of attachment were purported to be issued was the commissioned officer and to judicially know the genuineness of such officer's signature.—Ryan v. Young, Ala., 41 So. Rep. 924.

37. EVIDENCE—Ownership of Property.—General reputation as to the ownership of property is admissible on the issue of waiver of misrepresentations in relation thereto, to prove the knowledge of the agent issuing the policy.—Continental Ins. Co. v. Cummings, Tex., 95 S. W. Rep. 48.

38. EXCEPTIONS, BILL OF—Time For Signing.—An order extending the time for the signing of a bill of exceptions held of no effect.—Riddle v. Regan, Ala., 41 So. Rep. 953.

39. EXECUTORS AND ADMINISTRATORS—Deed of Land.—Deed of land of decedent reciting that sale was to pay debts of estate held not to show that it was to pay expenses of administration so as to render it void.—Shell v. Young, Ark., 95 S. W. Rep. 798.

40. FIXTURES—Engine Conditionally Sold to Lessee of Land.—An engine sold to a lessee, title not to pass until paid for, and placed on the leased land, held personalty, between the seller and lessor.—Best Mfg. Co. v. Cohn, Cal., 86 Pac. Rep. 829.

41. GOODS—Delivery to Consignee.—Where goods are delivered to a common carrier to be transported by a series of connecting lines, a *prima facie* case against the terminal carrier alone is made by evidence of delivery of the freight to the consignee in a damaged condition.—Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co., Tex., 95 S. W. Rep. 751.

42. GUARDIAN AND WARD—Guardian of Minor Children.—Guardian of minor children of a deceased first wife held, when authorized by probate court, to have a right of occupancy of an undivided homestead jointly with decedent's surviving second wife.—Cox v. Oliver, Tex., 95 S. W. Rep. 596.

43. HIGHWAYS—Establishment Under Statute.—Owners of land upon which a road was established held to have waived any right to complain of a failure to comply with statutory requirements.—Patterson v. Hill County, Tex., 95 S. W. Rep. 89.

44. HOMICIDE — Instructions.—In a prosecution for homicide, requests to charge held properly refused as leading the jury to believe that defendant was entitled to repudiate an accusation made by deceased in language calculated to provoke or encourage a difficulty.—Hanners v. State, Ala., 41 So. Rep. 973.

45. HOMICIDE—Self-Defense.—An instruction on self-defense that it was sufficient if the circumstances were such as to induce a reasonable person in defendant's position to believe he was in imminent danger of great bodily injury, held sufficient.—People v. Gallanar, Cal., 86 Pac. Rep. 814.

46. HUSBAND AND WIFE—Parol Evidence.—The lender's declaration that he would let a husband have the money on a mortgage executed by his wife on her land held to mean that he would let the husband have the money "for the wife."—Gibson v. Wallace, Ala., 41 So. Rep. 960.

47. HUSBAND AND WIFE—Personal Property.—A surviving second wife held not entitled to judgment for more than her proportionate share of personal property owned as community property by her deceased husband and a deceased first wife.—Cox v. Oliver, Tex., 95 S. W. Rep. 596.

48. INDICTMENT AND INFORMATION—Order Granting Leave to File New Information.—Where an order granting leave to file a new information was not entered on the date it was made, the court could direct the subsequent entry *nunc pro tunc*.—State v. Williams, Wash., 86 Pac. Rep. 847.

49. INFANTS—Guardian Ad Litem.—A failure to appoint a guardian *ad litem* for a minor heir without a guardian in proceedings for the partition of decedent's estate did not render the proceedings void.—Rye v. J. M. Guffey Petroleum Co., Tex., 95 S. W. Rep. 622.

50. INJUNCTION—Boycotts.—An injunction restraining a trade union and its members from boycotting complainant's place of business held erroneous in so far as it attempted to enjoin the mere expression of opinion concerning complainant and its business.—Goldberg, Bowen & Co. v. Stablemen's Union, Local Union No. 8769, Cal., 86 Pac. Rep. 806.

51. INJUNCTION—Use of Highway for Telephone Line.—The remedy at law held sufficient so that injunction will not lie against the cutting of trees in a highway in construction of a telephone line.—Hobbs v. Long Distance Telephone & Telegraph Co., Ala., 41 So. Rep. 1003.

52. JUDGES—Motion For New Trial.—Where a judge was absolutely disqualified by relationship, it was immaterial that defendant did not raise the objection until its motion for a new trial.—Gulf, C. & S. F. Ry. Co. v. Looney, Tex., 95 S. W. Rep. 691.

53. JUDGMENT—Collateral Attack.—The irregularity in a judgment in a suit to revive and correct a dormant judgment arising from the fact that it attempts to correct the original judgment cannot be questioned in a collateral proceeding.—Taylor v. Doom, Tex., 95 S. W. Rep. 4.

54. JUDGMENT—Interest in Land.—A judgment creditor of an heir, having purchased the heirs' interest in certain of decedent's lands, held authorized to maintain an action to set aside an order for the sale of the land to pay the debts of deceased.—Smart v. Panther, Tex., 95 S. W. Rep. 679.

55. JUDICIAL SALE—Setting Aside.—A confirmed sale of property under a chancery decree will not be set aside in a collateral proceeding unless the party seeking such relief acquits himself of want of diligence in resisting confirmation.—Harris v. Stephenson, Ala., 41 So. Rep. 1008.

56. JURY—Competency.—In the prosecution of a railroad baggagema-ter for embezzlement of the property of a passenger it is the better practice for the trial court to excuse from the jury the employees of the railroad company.—Hopkins v. State, Fla., 42 So. Rep. 52.

57. LANDLORD AND TENANT—Liability for Infectious Condition of Premises.—A landlord held not liable for injuries sustained by a tenant whose infant child became infected with a contagious disease in consequence of a person having prior to the tenancy infected the premises with such disease.—Finney v. Steele, Ala., 41 So. Rep. 976.

58. LOGS AND LOGGING—Contracts.—One entitled to enter on the land of another and cut and haul away standing timber pursuant to a verbal contract, held not liable as for breach of contract, for failing to go forward with the execution of the contract.—Colby Hinkley Co. v. Jordan, Ala., 41 So. Rep. 962.

59. MANDAMUS—Statement of Facts.—*Mandamus* held not available to compel the trial judge to make up a statement of facts under Rev. St. 1895, art. 1380, where his refusal was only because he believed the statement should be made up under Acts 29th Leg. (Laws 1905, p. 219, ch. 112).—Houston & T. C. R. Co. v. Burnett, Tex., 95 S. W. Rep. 741.

60. MASTER AND SERVANT—Obvious Dangers.—In an action for death of an inexperienced servant, the complaint held not fatally defective for failure to aver that the dangers were not obvious, or that he was not warned or cautioned as to their existence.—Moss v. Mosley, Ala., 41 So. Rep. 1012.

61. MASTER AND SERVANT—Assumed Risk.—A minor employee held to assume such risks of the business in which he engages as would be obvious to a person of intestate's apparent age, intelligence, and capacity.—Moss v. Mosley, Ala., 41 So. Rep. 1012.

62. MASTER AND SERVANT—Defective Appliances.—Where a railway conductor and engineer had knowledge of a defective coupling between two engines, it would be presumed, in the absence of evidence to the contrary, that they had reported such defect to the company.—Doyle v. Great Northern Ry. Co., Wash., 86 Pac. Rep. 861.

63. MASTER AND SERVANT—Duties of Master.—A master constructing a building is not liable for a transitory danger to which an employee is exposed, due to no fault of plan or construction.—Armour & Co. v. Dumas, Tex., 95 S. W. Rep. 710.

64. MINES AND MINERALS—Location Notice.—Under Comp. Laws, § 208, where conflicting claimants of a mining location posted their notice at the same point, such fact justified an inference that a discovery of mineral existed at that point.—Fox v. Myers, Nev., 86 Pac. Rep. 793.

65. MONEY PAID—City Taxes.—Where a mortgagee was compelled to pay city taxes in order to prevent the sale of the mortgaged property therefor, he was entitled to recover the amount paid against the person assessed, on an implied promise.—Stone v. Tilley, Tex., 95 S. W. Rep. 718.

66. MORTGAGES—Equitable Liens.—One claiming land under one who furnished money for redemption from execution sale held entitled to assert the equity against a mortgagee whose rights inured through the redemption.—New England Mortg. Sec. Co. v. Fry, Ala., 42 So. Rep. 57.

67. MORTGAGES—Foreclosure.—One who purchases a note and mortgage after maturity from the original mortgagee after a void foreclosure sale acquires no right thereto as against one in possession by conveyance from the purchaser at the sale.—Nash v. Northwest Land Co., N. Dak., 108 N. W. Rep. 792.

68. MUNICIPAL CORPORATIONS—Authority to Improve Streets.—The authority to grade and pave streets and sidewalks being legislative, the ascertainment of the amount of the improvement, its kind and character, cannot be delegated to any official or committee of the city.—Harton v. Town of Avondale, Ala., 41 So. Rep. 934.

69. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A city held guilty of negligence in permitting the maintenance of a hole in the sidewalk of a principal street, protected only by doors laid lengthwise over the same.—Hayes v. City of Seattle, Wash., 86 Pac. Rep. 852.

70. MUNICIPAL CORPORATIONS—Extent of Agent's Authority.—Persons dealing with a municipal corporation through its agent are bound to know the extent of the agent's authority and the corporation cannot be subjected to liability on a contract which he was not authorized to make.—Sheridan v. City of New York, U. S. D. C., S. D. N. Y., 145 Fed. Rep. 885.

71. MUNICIPAL CORPORATIONS—Changing Grade of Street.—The owner of property abutting on a street, which property is injured by a change of grade, without compensation, held entitled to injunctive relief.—Town of New Decatur v. Scharfenberg, Ala., 41 So. Rep. 1025.

72. MUNICIPAL CORPORATIONS—Changing Grade of Street.—The fact that there was no negligence in or about the changing of the grade of a street held not to defeat the right of abutting owner who had received no compensation to have the street restored to its former condition.—Town of New Decatur v. Smith, Ala., 41 So. Rep. 1028.

73. NOVATION—Assignment.—An order directing the drawee to pay to defendant bank all moneys which should become due to the drawer on final settlement including charter commissions on certain shipments of grain held to constitute a valid novation under Civ. Code, §§ 1530-1532.—Bank of Yolo v. Bank Woodland, Cal., 86 Pac. Rep. 820.

74. PARTNERSHIP—Misdescribed Bonds.—That 5 per cent. bonds were misdescribed as drawing 6 per cent. in a notice of sale thereof on foreclosure of a pledge, held not to invalidate the sale.—Farmers' Nat. Bank v. Venner, Mass., 78 N. E. Rep. 540.

75. PAYMENT—Drafts.—A draft sent to the general agent of the payee of a note and retained by him without notice that it would not be accepted as payment held to constitute payment.—Conde v. Dreisam Gold Min. & Mill. Co., Cal., 86 Pac. Rep. 825.

76. PRINCIPAL AND AGENT—Offer and Acceptance.—Where defendants requested plaintiff's agent to transmit to plaintiff an offer for the sale of cotton the agent became defendants' agent to receive plaintiff's acceptance.—McCleskey & Whitman v. Howell Cotton Co., Ala., 42 So. Rep. 67.

77. PRINCIPAL AND SURETY—Contribution Against Decedent's Estate.—Where claimant paid an entire indebtedness for which claimant and deceased were sureties, claimant was only entitled to contribution against decedent's estate to the extent of one-half of the amount so paid.—Smart v. Panther, Tex., 95 S. W. Rep. 679.

78. PROCESS—Correction of Officer's Return.—Where the return to a writ is defective, and it is remanded for correction, if it is amended to show service, a motion to dismiss must be overruled, but, if the writ is not amended the motion to dismiss must be sustained.—Abbott v. Abbott, Me., 64 Atl. Rep. 615.

79. PUBLIC LANDS—Application to Purchase.—That an applicant for the purchase of school lands stated that she was a citizen instead of that she had filed an application to become a citizen did not invalidate her title based on such application under Pol. Code, §§ 3495, 3500.—Pardee v. Schanzlin, Cal., 86 Pac. Rep. 812.

80. RAILROADS—Duty Toward Person Assisting Passenger to Board.—Statement of duty and liability of carrier to a person who boards a train merely to give necessary assistance to a passenger in taking passage.—Southern Ry. Co. v. Patterson, Ala., 41 So. Rep. 964.

81. RAILROADS—Special Trains.—Operators of a special train held under no obligations to anticipate the presence of cattle on the track at a depot.—Texas & N. O. R. Co. v. Langham, Tex., 95 S. W. Rep. 686.

82. SALES—Breach of Contract.—A buyer's measure of damages for the seller's breach of contract held the difference between the price he was to pay for the goods and the price which he was obliged to pay to supply himself with other goods.—Edgeworth v. Talerico, Tex., 95 S. W. Rep. 677.

83. SALES—Implied Warranty.—Where defendant purchased a known and described mining mill there was no implied warranty of fitness, though plaintiff was advised that it was intended for a special purpose.—Mine Supply Co. v. Columbia Min. Co., Oreg., 86 Pac. Rep. 789.

84. SALES—Options.—Where parties having an option to sell fail to exercise the same within a reasonable time, an action to enforce the contract as against the other party thereto cannot be maintained.—Hollis v. Libby, Me., 64 Atl. Rep. 621.

85. SALES—Payment by Buyer.—Payment by a buyer of goods of a draft in favor of a third person attached to a bill of lading, held not to necessarily absolve the seller from liability of damages caused by the delivery of inferior grade of goods.—Drake v. Pope, Ark., 95 S. W. Rep. 774.

86. SEQUESTRATION—Petition for Writ.—A petition for a writ of sequestration directing the seizure of an undivided one-fifth of all the rice grown by defendants on a certain tract of land held fatally defective.—Gravity Canal Co. v. Sisk, Tex., 95 S. W. Rep. 724.

87. STREET RAILROADS—Defective Tracks.—That a street railway company was authorized by the railroad commissioners to run cars before its track was finished does not exempt it from liability for injuries resulting from its imperfect condition.—Haynes v. Waterville & O. St. Ry., Me., 64 Atl. Rep. 614.

88. SUBROGATION—Reimbursement.—A mortgagee having paid taxes in order to save the land from sale, held not entitled to a special execution against the land to compel reimbursement.—Stone v. Tilley, Tex., 95 S. W. Rep. 718.

89. TAXATION—Conveyance of Land.—A conveyance by the land commissioner of swamp and overflowed lands as forfeited tax lands, when they were never the subject to taxation held to give no title.—Howell v. Miller, Miss., 42 So. Rep. 129.

90. TAXATION—Payment of Poll Tax.—The law exempting those from payment of a poll tax who have lost a hand or foot does not exempt one who has lost part of his fingers or whose foot is useless.—Bigham v. Clubb, Tex., 95 S. W. Rep. 675.

91. TAXATION—Redemption Certificate.—Where the auditor issued a certificate of redemption for the taxes for which plaintiff claims the property was sold, the state did not transfer the property for which the certificate issued, though after the time for redemption.—Lisso & Bro. v. Giddens, La., 41 So. Rep. 1029.

92. TELEGRAPHS AND TELEPHONES—Duties of Telegraph Company.—A telegraph company held chargeable with notice of the character of illness of a person referred to in a telegram.—Western Union Telegraph Co. v. Craven, Tex., 95 S. W. Rep. 633.

93. TELEGRAPHS AND TELEPHONES—Failure to Deliver Message.—In an action for failure to promptly transmit and deliver a telegraph message, an instruction held inaccurate as to the duty of the company as to transmission and delivery.—Western Union Telegraph Co. v. McDonald, Tex., 95 S. W. Rep. 691.

94. TENANCY IN COMMON—Owner of Undivided Interest.—An owner of an undivided interest in a tract of land has no right to sell to another an undivided interest in the timber on the whole tract separate from his undivided interest.—Hunter v. Hodgson, Tex., 95 S. W. Rep. 637.

95. TENANCY IN COMMON—Personalty.—An owner selling standing timber, and the buyer, held tenants in common of the timber cut, pursuant to the contract of sale.—Colby Hinkley Co. v. Jordan, Ala., 41 So. Rep. 962.

96. TRESPASS—Owner of Land.—An owner of land on which growing trees have been destroyed may sue for the injury caused to the land by the loss of the trees or he may sue for the value of the trees.—Galveston, H. & S. A. Ry. Co. v. Warnecke, Tex., 95 S. W. Rep. 600.

97. TRIAL—Conflict of Testimony.—Where there was a conflict of testimony as to a material issue, it was error to direct a verdict for defendant.—Raymer v. Standard Steel Works, Pa., 64 Atl. Rep. 902.

98. TRIAL—Verdict.—Where the court would set aside a verdict for a party because of insufficient evidence, a peremptory instruction for the adverse party is proper.—Wooten v. Mobile & O. R. Co., Miss., 42 So. Rep. 181.

99. TROVER AND CONVERSION—Mortgaged Property.—Where in trover plaintiff's title is based on a mortgage the measure of damages is the amount of the mortgage debt and interest, not to exceed the value of the property.—Ryan v. Young, Ala., 41 So. Rep. 954.

100. TRUSTS—Bill to Establish.—A bill by a wife to establish a resulting trust in land conveyed to her husband, held insufficient for failing to aver the facts out of which the alleged trust originated.—Gilbreath v. Farrow, Ala., 41 So. Rep. 1000.

101. TURNPIKES AND TOLL ROADS—Injuries Sustained From Defective Road.—In an action against a turnpike company for injuries received by alleged defect in a road, evidence held insufficient to show that such defects were the proximate cause of the injuries received.—Trout v. Waynsburg, G. & M. Turnpike Co., Pa., 64 Atl. Rep. 900.

102. VENDOR AND PURCHASER—Knowledge of Fraud.—A grantor who, with knowledge of a fraud practiced on him, induced a third person to purchase the land from the grantee, held not entitled to recover the same.—White v. White, Tex., 95 S. W. Rep. 733.

103. VENDOR AND PURCHASER—Mortgages.—A purchaser of real estate held justified in refusing to accept it subject to a certain mortgage.—Oppenheim v. McGovern, 100 N. Y. Supp. 712.

104. WATER AND WATER COURSES—Excavations Creating Reservoirs.—Where a railroad company constructed ditches and excavations creating reservoirs from which water reached and damaged plaintiff's land, the railroad company was liable, though the water escaped by percolation.—International & G. N. R. Co. v. Slusher, Tex., 95 S. W. Rep. 717.

105. WEAPONS—Concealment Question for Jury.—Whether the pistol which accused was shown to have carried, was carried so as not to be discernible by ordinary observation, is for the jury.—Hainey v. State, Ala., 41 So. Rep. 968.

106. WILLS—Liability for Attorney's Fees.—A succession held liable for fees of attorneys employed by the executor to conduct mortuary proceedings and defend the will.—Succession of Morere, La., 42 So. Rep. 132.

107. WILLS—Residuary Legatee.—In action for construction of will, evidence held insufficient to show that plaintiff was the residuary legatee designated in the will.—Harrington v. Abberton, 100 N. Y. Supp. 681.

108. WITNESSES—Evidence.—An instruction on a trial for murder that if the jury believed that one of the witnesses had sworn falsely he was not to be believed in any respect was reversible error.—Commonwealth v. Ieradi, Pa., 64 Atl. Rep. 889.

109. WITNESSES—Gaming.—On a prosecution for betting at a game of cards played at a public place held proper to ask witnesses if they could testify that the playing at such place could not be seen from any point along a certain public road.—Bradford v. State, Ala., 41 So. Rep. 1024.